January 6, 1954
Opinion No. 54-14

MEMORANDUM OF POINTS AND AUTHORITIES

TO: The Honorable Wesley Polley
Cochise County Attorney
Cochise County Courthouse
Bisbee, Arizona

RE: Peremptory challenge of prospective jurors.

QUESTION: Is the State, in a criminal trial for first degree murder, limited under the provisions of Section 44-313 A.C.A. 1939, to a peremptory challenge against a prospective juror who has conscientious scruples against the infliction of the death penalty?

The causes for challenges to individual jurors are set forth in Section 5035 R.C.A. 1928. The applicable portion to the question here presented reads as follows:

> "§5035. Causes for individual challenges. Either party may challenge any individual juror for the following causes: * * *
> * * * * *
> 14. if the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he must neither be permitted nor compelled to serve as a juror; * * *"
> (Emphasis supplied)

Beginning with the case of LEIGH v. TERRITORY, (1906) 10 Ariz. 129, 85 P. 948, it was clear that under this statutory provision a prospective juror who, upon examination, displays conscientious scruples against the infliction of the death penalty in a trial of an offense which is punishable in the option of the jury by death or imprisonment for life, was not a competent juror and it was proper to allow a challenge for cause of such a juror.

The court in the LEIGH v. TERRITORY case, supra, used the following language, at page 137:

> "The second assignment of error is as follows: 'That the court erred in allowing a challenge for cause of the territory to the juror J. W. Thompson, and the juror John Musser, for the reason that said jurors were not disqualified under our statute as to the conscientious scruples concerning the death penalty. And for the further reason that said jurors did not entertain any such conscientious opinions as would preclude them from finding the defendant guilty of murder in the first degree. For the further reason that under our statute the jury may find the person guilty of murder in the first degree, and fix his punishment at either death or imprisonment, and the objections to conscientious scruples must be that the juror would be precluded from finding the defendant guilty, and not that he would dislike to hang a man.' Subdivision 14 of section 910 of the Penal Code, provides, as a ground of challenge for cause: 'If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juoror.' The record shows that both these jurors stated that they entertained such conscientious opinions as would preclude them from finding the defendant guilty. The juror Thompson, however, on further examination, stated that his opinion would not prevent his finding the defendant guilty and fixing the punishment at imprisonment for life, if the evidence warranted it; but that the opinion he held would preclude him from fixing the death penalty. This qualification did not bring the juror outside the clear meaning and intent of the statute. Although the jury may fix the punishment for murder in the first degree at either death or imprisonment for life, the offense of murder in the first degree is, nevertheless, one 'punishable with death,' and the entertaining of such a conscientious opinion as precludes the juror from the infliction of the death penalty precludes the juror from finding the defendant guilty of an offense punishable with death, and brings

> him within the statute which requires the court to exclude him. Nor does it follow, as contended for by the appellant, that the enforcement of this rule compels a defendant to accept a jury all the members of which are of the opinion that, if he were guilty of murder in the first degree, his penalty should be death. The rule only forces a defendant to accept a jury free to impose either the death penalty or imprisonment for life; and the territory has the right to a jury that will impose the graver penalty if warranted by the circumstances, untrammeled by any conscientious opinions against its infliction."

In the case of YOUNG v. STATE, (1931) 38 Ariz. 298, 299 P. 682, this rule was reaffirmed. The court, citing Section 5035, sub-division 14, supra, held, at page 302:

> "The law of Arizona provides that a person who has a conscientious scruple against capital punishment shall be neither required nor permitted to sit as a juror in cases where the death penalty may be inflicted. * * *"

Thus, it seems clear, prior to 1940 under the wording of Section 5035, supra, and the cases above cited, that a prospective juror who had conscientious opinions against the infliction of the death penalty and these opinions would preclude the juror from finding the defendant guilty of an offense punishable by death even though the punishment of death is at the option of the jury, such a juror is properly dismissed for cause.

Pursuant to Section 19-202, A.C.A. 1939, and Section 19-204, A.C.A. 1939, the Supreme Court of Arizona adopted Rules of Criminal Procedure, effective April 1, 1940. These Rules were based upon the model Code of Criminal Procedure prepared by the American Law Institute.

The enumerated grounds for challenge to an individual juror for cause are now embodied in Section 44-1313, A.C.A. 1939. The portion applicable to the present question reads:

> "44-1313. Grounds for challenge to individual juror for cause.--A challenge for cause to an individual juror may be made only on the ground:
> * * *
> * * * * *
> (c) That the juror entertains such conscientious convictions as would preclude his finding the defendant guilty."

Does the omission of the phrase "if the offense charged be punished with death" as is contained in Section 5035(14), supra, from Section 44-1313 (c), supra, prevent the exercise of a challenge for cause in a proper case to a prospective juror who entertains conscientious scruples against the death penalty?

In the beginning it may be well to scrutinize statutes in other states relative to challenges for cause.

Section 77-30-19, Utah Code Annotated, (1953), provides:

> "77-30-19. For implied bias--Grounds.--A challenge for implied bias may be taken for all or any of the following causes, and for no other: * * *
>
> * * * * *
>
> (9) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."

Section 26-917, Oregon Compiled Laws Annotated, reads:

> "§26-917. Challenge of jurors: Causes: Implied bias. A challenge for implied bias may be taken for any of the following causes, and for no other: * * *
>
> * * * * *
>
> (6) If the offense be punishable with death, the entertaining of such conscientious opinions as would preclude a person from finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror."

It will be noted that the wording of the Oregon law is almost exactly the same as that contained in Section 5035, supra.

Likewise, Section 10946, Nevada Compiled Laws, (1929), specifies as follows:

> "§10946. GROUNDS FOR CHALLENGE FOR IMPLIED BIAS. §298. A challenge for implied bias may be taken for all or any of the following causes and for no other: * * *
>
> * * * * *
>
> 9. If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude his finding the

defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."

Section 2142, Revised Statutes of Washington reads:

"§2142. Conscientious scruples of juror as to capital punishment. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serve as a juror on the trial of any indictment or information for such an offense."

In addition, the Penal Code of California, Section 1074, states in part.

"§1074. (Challenge for implied bias: Causes.) A challenge for implied bias may be taken for all or any of the following causes, and for no other: * * *

* * * * *

8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."

Consequently, in view of the wording of the above quoted statutes from other states it would seem that any cases decided under those statutes would not be applicable to the present question under consideration. This is true notwithstanding the holding of SHAUGHNESSY V. STATE, (1934) 43 Ariz. 445, 32 P.2d 337, that the criminal procedure in Arizona was largely copied from California and that the Arizona Supreme Court has uniformly followed California decisions on such matters.

The right to trial by jury is provided for in Article 2, section 23 of the Arizona Constitution, which reads:

"§23. (Trial by jury.)--The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto."

And further by Article 2, section 24, Arizona Constitution, wherein it is stated:

> "§24. (Rights of accused.)--In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." (Emphasis supplied)

The purpose of these constitutional provisions and the statutes permitting both challenges for cause and peremptory challenges, is not that the defendant should be afforded any particular jury but only a fair and impartial one. WILSON v. WIGGINS, (1939) 54 Ariz. 240, 94 P.2d 870.

This principle of law was explicity followed in the leading case of CONNER v. STATE, (1939) 54 Ariz. 68, 92 P.2d 524, where the court held:

> "* * * A defendant is not entitled to be tried by any particular jury, but merely by one which is fair and impartial. All of the formal rules of law regarding the formation of a jury are intended to secure this kind of a jury, and have no other purpose. If the record shows affirmatively that such a jury was secured, even though some of the formal provisions of the law regarding the manner of their selection may have been disregarded, and that the evidence fully and completely sustains their verdict, we think the provision of the Constitution (Article 6, section 22) above quoted applies." (Parenthetical material supplied)

In accord see BROUGH v. STATE, (1940) 55 Ariz. 276, 101 P.2d 196.

Previously, the Arizona Supreme Court had announced the rule in KINSEY v. STATE, (1937) 49 Ariz. 201, 65 P.2d 1141, in the following terms:

> "* * * the court excused a juror because it evidently felt he was disqualified on the question of circumstantial evidence. The exclusion of a juror by the court, even though erroneous, is of itself never a ground for a reversal, for the defendant is not entitled to have his case tried by any particular juror, but merely by twelve who are properly qualified and impartial. * * *" (Emphasis supplied)

An excellent summation of these principles is set forth in Law and Tactics in Jury Trials by F. X. Busch at Section 72, page 105, as follows:

> "§72. Nature of right to challenge.--The right to challenge is the right to reject, not the right to select. The parties to a cause are entitled to qualified and impartial jurors; not a jury made up of particular persons. Thus, while the essential requirements of law for the selection and summoning of jurors must be observed, a party to a cause may not complain that a juror regularly summoned has not appeared; or that a juror was excused by the court without cause; or that the court erred in sustaining a challenge for cause; or that the court excused a juror for illness after the jury had been sworn where the court summoned a new juror and restored to the objecting defendant the right to challenge the entire new panel of twelve. It has been held that the court may properly direct that certain jurors be not called, as in a case where they have just been returned into court from an extended deliberation in another case; so, also, where two regular juries are serving in the same court, a party has no right to insist upon one jury in preference to the other." (Emphasis supplied)

It is well settled in Arizona that upon a challenge for cause the decision as to whether the juror as a matter of fact is disqualified must, in each particular case, rest in the sound legal discretion of the trial court. BURNETT v. STATE, (1928) 34 Ariz. 129, 268 P. 611. Furthermore, the exercise of such discretion will not be overruled unless there is an abuse thereof.

The Supreme Court, in 1937, citing BURNETT v. STATE, supra, held in the case of RILEY v. STATE, (1937) 50 Ariz. 442, 73 P.2d 96, that:

> "* * * The question of whether a juror should be excluded on a challenge for cause, on the ground that he will not be fair and impartial is, to a great extent, in the sound legal discretion of the trial court. * * *"

In 1948 the Arizona Supreme Court again enunciated the rule that the trial court has the right to use its discretion in passing upon challenges to jurors in the case of STATE v. BRADY, (1948) 66 Ariz. 365, 189 P.2d 198.

Although the case of J.&B.MOTORS, INC. v. MARGOLIS, (1953) 75 Ariz. 392, 257 P.2d 588, was a civil one involving challenges for cause under Section 37-122, A.C.A. 1939, the court cited several criminal cases and used the following language:

> "* * * when a juror is challenged, whether the same shall be denied or allowed is largely within the discretion of the trial court, and his discretion thereon will not be disturbed in the absence of an abuse thereof. Riley v. State, 50 Ariz. 442, 73 P. 2d 96; State v. Brady, 66 Ariz. 365, 189 P. 2d 198. * * *"

A comparision of the verbage of Section 5035 (14), supra, and Section 44-1313 (c), supra, displays that the later enactment is much broader in its terms and though strictly construed would seem to include trials where the offense charged was punishable by death as specified in Section 5035 (14), supra.

Although Section 44-1313, supra, was adopted by the Supreme Court pursuant to Section 19-202, supra, and Section 19-204, supra, and was not passed by the Arizona Legislature, nevertheless, the general rules of interpretation of statutory laws are applicable.

As stated in 50 Am. Jur., Statutes, Section 229, it is a cardinal rule of interpretation that the meaning of a statute may be extended beyond precise words or phrases used in order to carry out the general scope and purpose of the act.

50 Am. Jur., Statutes, Section 234, also sets forth the rule that words or phrases may be supplied by the courts and inserted in the statute where it is necessary to prevent inconsistencies and complete the sense thereof. This rule appears to be especially pertinent where its application is to prevent the law from becoming a nullity. This principle was enunciated and followed in KELLER v.

STATE, (1935) 46 Ariz. 106, 47 P.2d 442.

Assuming, merely for the purpose of argument, that Section 44-1313 (c), supra, does not expressly allow a challenge for cause to a juror who entertains conscientious convictions against the death penalty in a trial for an offense punishable by death, such a right is certainly included therein by implication or reference. Pertaining to this theory 50 Am. Jur., Statutes, Section 242, reads, in part, as follows:

> "* * * a statute often speaks as plainly by inference as in any other manner, and it is a general rule that that which is clearly implied from the express terms of a statute is as much a part thereof and is as effectual as that which is expressed. * * *"

An important question involved in the solution of the problem is the extremely undesirable consequences which will result if Section 44-1313 (c), supra, is interpreted to prevent the state from challenging for cause a prospective juror who has scruples against the death penalty in a case where the offense charged may be punished by death. Of course, under the provisions of Section 44-1320 (a), A.C.A. 1939, the state would have the right to ten (10) peremptory challenges. However, it is conceivable that the state could exercise its ten (10) peremptory challenges and still there would remain two jurors having conscientious scruples against the death penalty.

Relative to such considerations, 50 Am. Jur., Statutes, Section 368, sets forth the following principles:

> "§368. Generally.--The results which will follow one construction or another of a statute is often a potent factor in its interpretation. Frequently, the undesirable or mischievous consequences of a different construction are used by the courts to indicate the correctness of the interpretation adopted by them by the application of other rules of construction. Similarly, courts sometimes take the time and space to refute the undesirable consequence claimed to attach to a statute under an interpretation of it favored by the courts. Indeed, there are cases in which the consequences of a particular construction are, in and of themselves, conclusive as to the correct solution of the question."

> In any event, it is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. * * *it is presumed that undesirable consequences were not intended, to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. It is accordingly a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of a beneficial operation of the law, and a construction of which the statute is fairly susceptible, is favored, which will avoid all objectionable, mischievous, indefensible, wrongful, evil, and injurious consequences. * * *" (Emphasis supplied)

Furthermore, it is stated in 50 Am. Jur., Statutes, Section 377:

> "§377. Unreasonableness or Absurdity. A statute subject to interpretation is presumed not to have been intended to produce absurd consequences, but to have the most reasonable operation that its language permits, and it is a general rule that where a statute is ambiguous in terms and fairly susceptible of two constructions, the unreasonableness or absurdity which may follow one construction or the other may properly be considered. * * * If possible, doubtful provisions should be given a reasonable, rational, sensible, and intelligent construction. Unreasonable, absurd, or ridiculous consequences should be avoided. These rules prevail where the language of the statute fairly permits their operation, that is, where they are not restrained by the clear language of the statute, imperatively requiring another construction. * * *"

Again assuming, merely for purposes of argument, that Section 43-1313 (c), supra, neither expressly nor impliedly permits a challenge for cause by the state to a prospective juror who has conscientious scruples against the death penalty in a case where

the offense may be punishable by death, nevertheless, the provisions of Section 5035 (14), supra, are effective and applicable thereto permitting such challenges for cause.

50 Am. Jur., Statutes, Section 43, provides, at page 60:

> "§43.--Scope.--Uniform state laws are not formulated or adopted with a view of making any radical changes in the law as generally understood and administered, but are generally a codification, compilation, or restatement of the rules of law that were previously in force and effect by virtue of legislative enactment and judicial pronouncement. They do not seek to alter existing law except to meet the exigencies of conflicting rules in different states. Where there is a conflict or doubt under the previous authorities, the prior law is frequently changed. Uniform state laws are decisive as to all matters comprehended within their terms, where uniform laws speak clearly, they control and prior conflicting adjudiciations must yield. Where no provision is made by the uniform law in regard to a particular matter, the former law is generally regarded as in effect. (Emphasis supplied)

In accord, see ALBERT STEINFELD & CO. v. ALLISON MINING CO., (1933) 41 Ariz. 340, 18 P.2d 267; also, WALKER v. PEOPLES FINANCE & THRIFT CO., (1935) 46 Ariz. 224, 49 P.2d 1005.

Section 19-204, supra, prescribes:

> "19-204. Existing statutes deemed rules of court.--All statutes relating to pleading, practice and procedure, existing at the time this act takes effect shall be deemed to be rules of court and shall remain in effect as such until modified or suspended by rules promulgated pursuant to this act." (Emphasis supplied)

Certainly, it is clear that if Section 44-1313 (c) does not expressly nor impliedly include all challenges permitted under Section 5035 (14), supra, most assuredly Section 44-1313 (c) does not in any way modify or suspend Section 5035 (14), supra.

Therefore, in accordance with Section 19-204, supra, Section 5035 (14) remains in force and effect and permits challenges for cause by the state where a prospective juror manifests scruples against the infliction of the death penalty in any trial of an offense where death may be imposed as punishment.

The case of CHITWOOD v. EYMAN, (1952) 74 Ariz. 334, 248 P.2d 884, involved a very similar problem as that faced at the present time. In that case Section 4929 R.C.A. 1928 was in question. Section 4929, supra, although very comprehensive, was not carried forward to the Arizona Code Annotated of 1939 for the reason that Rules of Criminal Procedure, Section 1, Section 44-102, A.C.A. 1939, and Section 44-101, A.C.A. 1939, supposedly covered all situations which had been previously covered under Section 4929, supra. Such was not the case, since neither of the two statutes permitted the magistrate to subpoena witnesses.

Relative thereto the CHITWOOD case, supra, held:

> "It must be remembered that by the provisions of Chapter 8, Laws of 1939, now appearing in Section 19-202 to 19-204, the legislature conferred upon the Supreme Court the right to promulgate rules regulating pleading, practice and procedure in judicial proceedings in all courts of the state, * * *
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> * * * * *
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> The court adopted a code of criminal procedure, by rules effective April 1,1940. These adopted rules are not all-inclusive by virtue of the provisions of Chapter 8, supra. * * *
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> * * * * *
>
> It will be noted that this section (4929 R.C.A. 1928) has not been carried forth in Arizona Code Annotated of 1939. This for the reason that the compiler of the 1939 Code was of the opinion that this section was substantially carried forward in Rules of Criminal Procedure, Sections 1 and 2, now appearing as Section 44-102, 44-103. See note to Sec. 44-102. Section 4929, R.C.A. 1928, however, more comprehensive than the Rules of Criminal Procedure, Sections 1 and 2, in that it extended to the magistrate the power to subpoena and examine witnesses as to the truth of the complaint and compelled the issuance of subpoenas if so directed by the county attorney. We believe that the provisions of Section 4929 should have been carried forth into the 1939

> Code, and that its provisions not modified or suspended by subsequent rules are still in effect. * * *" (Emphasis supplied; parenthetical matter supplied)

In addition to those propositions set forth above, it is also necessary to consider what is commonly termed as "The substantial justice rule". This rule, of course, is only applicable if there was error by the trial court in permitting the state to challenge for cause those jurors having scruples against the death penalty.

Article 6, section 22, Arizona Constitution, reads:

> "§22. (Criminal procedure.)--The pleadings and proceedings in criminal causes in the courts shall be as provided by law. No cause shall be reversed for technical error in pleading or proceedings when upon the whole case it shall appear that substantial justice has been done." (Emphasis supplied)

Pursuant thereto the legislature enacted Section 44-2540, A.C.A. 1939, which specifies:

> "44-2540. Decisions must be upon merits and substantial justice.--After hearing the appeal, the court shall give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, and no judgment in any criminal action shall be reversed for technical error in pleading or proceedings when upon the whole case it appears that substantial justice has been done."

The case of BURGUNDER v. STATE, (1940) 55 Ariz. 411, 103 P.2d 256, presents an excellent statement and review of the so-called "substantial justice rule", at page 429:

> "We think this case is one in which what defendant rather testily calls 'the substantial justice rule' should be applied. We have frequently invoked such rule to avoid the expense and delay of a retrial when from the evidence it appeared no different result was likely in a new trial or where the error complained of did not affect the result. The rule is not liked by criminals or persons charged with crime. It has a tendency to lessen their chances of

escaping from just punishment, and we think it protects society without depriving an accused of any statutory or constitutional right. One of the earlier cases wherein this rule was invoked is West v. State, supra. In that case errors in the trial were manifest but we said:

'. . . The Legislature of this state, in section 1170 of the Penal Code (now section 5146, Revised Code of 1928), announces as a guide for this court the following very salutary and common sense rule:

"After hearing the appeal, the court shall give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties, and no judgment in any criminal case shall be reversed for technical error in pleading or proceedings when upon the whole case it appears that substantial justice has been done."

'This rule is a restatement of section 22, article 6, of the Constitution. We have said in Birch v. State, 19 Ariz. 366, 171 Pac. 135:

'"Cases may be reversed in this court only where the record affirmatively shows error prejudicial to some substantial right of a defendant."

'And in Bush v. State, 19 Ariz. 195, 168 Pac. 508, we said:

'"We are persuaded that had the record been free of the error suggested for reversal the verdict of the jury would not have been otherwise."

--and refused to reverse the case for that reason. The tendency of legislation and judicial decision in recent years has been to require of a defendant, complaining of his conviction, to show that some right of his has been prejudiced, before setting aside a conviction. The effort is not to disregard his guaranties under the law and Constitution, but to strip the trial of all the common-law niceties of pleading and procedure that formerly had been used as a means of delay and sometimes to defeat justice. California has a constitutional provision, worded differently from ours, but conveying the same general meaning, and the California court has held that:

'"No presumption of prejudice arises from the mere fact of error. On the contrary, it

> must affirmatively appear to this court that the defendant has been substantially injured by the error complained of." People v. Lawlor, 21 Cal. App. 63, 131 Pac. 63; People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042; People v. Fleming, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881; People v. Lapara, 181 Cal. 66, 183 Pac. 545; People v. Bonfanti, 40 Cal. App. 614, 181 Pac. 80.'
>
> Under this rule, injury is not conclusively presumed, as formerly, from error but must be shown. Lawrence v. State, 29 Ariz. 247, 240 Pac. 863; Id., 29 Ariz. 318, 241 Pac. 511, Turley v. State, 48 Ariz. 61, 59 Pac. (2d) 312; Riley v. State, 50 Ariz. 442, 73 Pac. (2d) 96; Conner v. State, 54 Ariz. 68, 92 Pac. (2d) 524." (Italics underscored)

A prior statement of this well-founded rule was made in the case of LAWRENCE v. STATE, (1925) 29 Ariz. 247, 240 P. 863, as follows:

> "One of the chief causes for the alarming increase of crime and the lessened esteem in which the administration of criminal justice is notoriously held by the layman undoubtedly is the tendency of the courts to adhere to archaic rules of procedure, when the reasons which caused their adoption have long since vanished. In ancient times a man accused of crime had no right to counsel; could not even testify in his own behalf; had no means of compelling the attendance of witnesses; was not entitled to bail as of right; and the cards were in many ways heavily stacked against him. It was in order to lessen, partially at least, these heavy odds that the courts adopted the rule that any error against a defendant in a criminal case was presumed to be prejudicial. But of late years the situation has changed. Every disability of the defendant has been removed, and he is now brought to trial, not only with every right enjoyed by the state, but with many privileges denied the latter. As an illustration of this we cite a few instances: The defendant must be advised in advance of trial of the exact nature of the

charge against him. The state can only guess at his line of defense. He may ask for a change of place of trial, and disqualify the trial judge. The state cannot. He always has more challenges to the jury than the state. He may take the depositions of absent witnesses on his behalf. The state may not take them against him. He need not testify unless he wishes, and the state cannot comment on the fact. If a state's witness fails to take the stand, the defendant may comment as he desires. The state must prove his guilt beyond all reasonable doubt. He may admit doing the act charged, and, if he sets up any special defense, such as insanity, self-defense, lack of criminal intent, etc., he need not prove it by even a preponderance of evidence. The mere raising of a reasonable doubt as to whether or not the defense is true acquits him. And above all, if he is finally convicted he may appeal at the expense of the state, and show in the appellate court any mistake committed in the trial below, while, if he be acquitted, no matter if as a result of the grossest error by the court, perjury by the witnesses, or bribery of the jury he may with impunity boast of his crime. He is free for all time, for the state may not by an appeal show the unjust acquittal and again place him on trial. To hold that with the balance thus changed in his favor he should be given the additional privilege of claiming that any error of procedure, no matter how trivial, and no matter how little it may have affected the verdict, entitles him to a new trial is indeed to say with one of our law-writers that 'in a criminal trial the state has no rights which a defendant is bound to respect.'

The people of Arizona themselves have expressed their opinion of this doctrine. Article 6, section 22, of our Constitution * * * was undoubtedly inserted for the express purpose of avoiding the many miscarriages of justice occasioned by strict adherence to the old rule of presumption that error is prejudicial, and it is our duty to give it the effect intended by its makers. Whatever may be the rule in other jurisdictions, we hold that in Arizorano cause, civil or ciminal, will be

> reversed for formal error, when upon the whole case it appears that substantial justice has been done, and that prejudice will not be presumed, but must appear probable from the record."

A careful examination of the voir dire examination of those jurors finally selected forcefully indicates that the defendant had a fair and impartial jury, thus, preserving any and all of his substantial rights of trial by jury.

In view of the above outlined cases, statutes and propositions, we respectfully submit that it was proper for the trial court to allow the state a challenge for cause against all prospective jurors having conscientious scruples against the infliction of the death penalty.

To construe Section 5035 (14), supra, and Section 44-1313 (c), supra, otherwise would lead to most astounding and disastrous conditions.

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